

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VAL J. WALDON,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

Case No.: 15cv631 AJB (NLS)

**REPORT AND
RECOMMENDATION FOR ORDER:**

**(1) GRANTING PLAINTIFF'S
CROSS MOTION FOR SUMMARY
JUDGMENT [Dkt. No. 16]; and**

**(2) DENYING DEFENDANT'S
CROSS MOTION FOR SUMMARY
JUDGMENT [Dkt. No. 20].**

Plaintiff Val Waldon brings this action under the Social Security Act, 42 U.S.C. § 405(g), seeking judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner" or "Defendant") denying his claim for social security benefits. This case was referred for a report and recommendation on the parties' cross motions for summary judgment. See 28 U.S.C. § 636(b)(1)(B). After considering the moving papers, the administrative record, and the applicable law, the court

1 **RECOMMENDS** that Plaintiff's motion for summary judgment be **GRANTED** and the
 2 case be reversed and remanded to the Social Security Administration for the calculation
 3 of the award of benefits, and that Defendant's cross motion for summary judgment be
 4 **DENIED**.

5 **I. BACKGROUND**

6 **A. Procedural History.**

7 Waldon filed applications for a period of disability and social security disability
 8 insurance benefits (SSD) on August 27, 2008. Administrative Record (AR) 174-184. He
 9 alleges his condition rendered him unable to work on March 1, 1997. *Id.* An
 10 Administrative Law Judge (ALJ) held hearings on April 12 and August 30, 2010. AR
 11 59-67, 34-58. Waldon testified at the April hearing. AR 59-67. Waldon, medical expert
 12 Arvin Klein, and vocational expert John Kilcher testified at the August hearing. AR 34-
 13 58. Based on the testimony and documentary evidence the ALJ issued a decision
 14 denying Waldon's application for benefits. AR 18-33. Waldon filed an administrative
 15 request to review the decision. AR 16-17. The Appeals Council denied the request for
 16 review, and the ALJ's decision became final. AR 1-6.

17 Waldon then filed a complaint for judicial review in this court. This court found
 18 legal error in the ALJ's decision and reversed and remanded for further proceedings. AR
 19 1033-1058. An ALJ held another hearing on October 14, 2014. AR 956-999. On
 20 November 20, 2014, the ALJ again determined that Val Waldon was not disabled. AR
 21 897-919.

22 **B. Order Remanding this Action.**

23 In this court's Report and Recommendation for Waldon's first appeal ("R&R 1"),
 24 it found that the ALJ's denial of benefits was unsupported because he did not cite clear
 25 and convincing evidence to reject either the opinion of Waldon's treating physician for
 26 10 years, Dr. Sprague, or Waldon's own testimony. The court ordered the ALJ, on
 27 remand, to properly consider the entire record when weighing the opinion of Dr. Sprague
 28 and the testimony of Mr. Waldon. *See Waldon v. Astrue*, 12cv1323 AJB (NLS).

1 **C. Medical Evidence: Treating Physician Dr. Carol Sprague.**

2 Waldon has a history of insulin dependent diabetes mellitus, hypertension,
3 depression, post traumatic stress disorder, substance, alcohol and Vicoden abuse, asthma,
4 coronary artery disease, myocardial infarction, peripheral neuropathy, cerebrovascular
5 accident in 1996 with right lower extremity weakness, gastroesophageal reflux disease,
6 and hypoglycemia. AR 23, 240-286, 380-851, 853-896. Those diagnoses are based on
7 reports from several physicians. *See* R&R 1, pp.2-3. The ALJ found that during the time
8 period in question, Waldon had severe diabetes mellitus, hypertension and substance
9 abuse disorder. AR 26.

10 One of the two major issues in this appeal concerns the opinion of Dr. Carol
11 Sprague from the Veterans Affairs Medical Center, who treated Waldon from December
12 2000 through March 2009. AR 289-348; 380-852. She diagnosed him as suffering from
13 diabetes with significant peripheral neuropathy in his feet, significant numbness in his
14 thighs with severe pain (meralgia paresthetica), distant history of a stroke with chronic
15 right lower extremity numbness and mild weakness, high blood pressure, high
16 cholesterol, obstructive sleep apnea, obesity, depression and PTSD symptoms. AR 852.
17 She noted he takes the following medications: metformin, insulin, simvastatin,
18 metoprolol, losartan, doxazosin, pantoprazole, testosterone, duloxetine, amitriptyline,
19 trazodone and methadone. *Id.*

20 **D. Waldon's Testimony.**

21 At the first set of hearings, Waldon testified that various impairments prevented
22 him from working since at least 1997. AR 26, 43-51. He testified that he broke his right
23 wrist and had three operations on it. AR 26. While recovering from his wrist injuries he
24 had a stroke followed by right sided weakness. AR 26, 43. He has used a cane since the
25 late 1990s due to weakness on his right side. AR 41, 45. While he was treated at UCSD
26 for the stroke, those records are no longer available. AR 43, 65-66.

27 Waldon was insulin-dependent due to his 1993 diagnosis of diabetes. AR 26. Diet
28 and medicine helped his diabetes. AR 26. He stopped using cocaine in 1999, after he

1 was incarcerated. AR 26. Waldon said that he could not sustain an eight hour workday
 2 and 40 hour workweek due to his energy level and medication levels. AR 26. He said he
 3 could perform a full range of work with these nonexertional limitations: mild restrictions
 4 of activities of daily living, moderate difficulties maintaining social functioning, and mild
 5 difficulties maintaining concentration, persistence or pace, and the need to avoid hazards.
 6 AR 25.

7 **E. Residual Functional Capacity.**

8 After the first set of hearings, the ALJ concurred with RFC assessment by Dr.
 9 Klein, the state's medical expert, and found that Waldon "had no exertional limitations
 10 and no postural limitations and is able to sit for six hours, stand for six hours, and walk
 11 for six hours in an eight hour workday, but should avoid hazards." AR 27-28. After the
 12 hearing on remand, the ALJ changed the RFC and limited Waldon to perform sedentary
 13 work, except that he could lift and carry up to 10 pounds at one time, and never more.
 14 AR 905. He also found that he can sit for six hours in an eight hour work day, and can
 15 stand or walk for two hours in an eight hour work day. AR 905.

16 **F. The ALJ's Decision.**

17 **1. Evaluating Social Security Disability Claims.**

18 To qualify for disability benefits under the SSA, an applicant must show that he or
 19 she cannot engage in any substantial gainful activity because of a medically determinable
 20 physical or mental impairment that has lasted or can be expected to last at least 12
 21 months. 42 U.S.C. §423(d). The Social Security regulations establish a five-step
 22 sequential evaluation for determining whether an applicant is disabled under this
 23 standard. 20 C.F.R. § 404.1520(a); *Batson v. Comm'r of the Social Security Admin.*, 359
 24 F.3d 1190, 1194 (9th Cir. 2004).

25 At Step 1, the ALJ determines whether the applicant is engaged in substantial
 26 gainful activity. 20 C.F.R. § 404.1520(a)(4)(I). At Step 2, the ALJ determines whether
 27 the applicant suffers from a "severe" impairment within the meaning of the regulations.
 28 20 C.F.R. § 404.1520(a)(4)(ii). If the impairment is severe, the ALJ goes on to Step 3 to

1 decide whether the impairment meets or equals one of the “Listing of Impairments” in the
2 Social Security regulations. 20 C.F.R. § 404.1520(a)(4)(iii). If it does, the applicant is
3 found disabled, and benefits are awarded. *Id.* If the impairment does not meet or equal a
4 Listing, the ALJ goes on to Step 4 to determine whether the applicant retains the residual
5 functional capacity to perform his or her past relevant work. 20 C.F.R. §
6 404.1520(a)(4)(iv). If the applicant cannot perform past relevant work, the ALJ—at Step
7 5—must consider whether the applicant can perform any other work that exists in the
8 national economy. 20 C.F.R. § 404.1520(a)(4)(v); *Kennedy v. Colvin*, 738 F.3d 1172,
9 1175 (9th Cir. 2013); *see Garrison v. Colvin*, 759 F.3d 995, 1010-11 (9th Cir. 2014)
10 (discussing the sequential process in greater length).

11 While the applicant carries the burden to prove eligibility at Steps 1 through 4, the
12 burden at Step 5 rests on the agency. *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir.
13 2003). Applicants not disqualified at Step 5 are eligible for disability benefits. *Id.*

14 **2. Substance of ALJ Decision.**

15 The ALJ again determined that Waldon satisfied Step 1 of the evaluation because
16 he met the insured status requirement of the Social Security Act through June 30, 2002
17 and had not engaged in substantial gainful activity since March 1, 1997, the disability
18 onset date. AR 903. At Step 2, the ALJ found that Waldon suffered from the following
19 “severe” impairments as defined in the regulations: diabetes mellitus; peripheral
20 neuropathy; history of cerebrovascular accident; gastroesophageal reflux disease;
21 hypertension; dyslipidemia; right knee pain; possibly osteoarthritis and a history of
22 alcohol and cocaine dependence. AR 903. He found that these impairments “cause more
23 than a slight limitation of the claimant’s physical or mental ability to do basic work
24 activities[.]” AR 903. The ALJ also found that Waldon’s post-traumatic stress disorder
25 (PTSD) was non-severe and did not cause more than a minimal limitation in his ability to
26 perform basic mental work activities. AR 903.

27 Moving on to Step 3, the ALJ found Waldon did not suffer from an impairment or
28 combination of impairments that met or medically equaled one of the impairments in the

1 Social Security Regulations. AR 905; see 20 C.F.R. §§ 404.1520(d), 404.1525,
2 404.1526. The ALJ noted these findings: in a December 1, 2000 visit to the Veterans’
3 Affairs Medical Center, Waldon had not experienced symptoms of PTSD nor received
4 treatment for it in the previous year; and at medical appointments in 1998 and in 2001
5 and at the hearing before the ALJ, Waldon gave conflicting stories on his military
6 service, combat history and source of PTSD, which the ALJ attributed to dishonesty
7 rather than any other cause. AR 903-904. The ALJ then went on to address the four
8 elements of the “paragraph B” criteria to evaluate mental disorders. He found that
9 Waldon could perform all his activities of daily living; had only mild limitations in social
10 functioning; and had only mild limitations in concentration, persistence and pace; and
11 had not experienced any extended periods of decompensation. AR 904-905.

12 In determining—at Step 4—whether Waldon retained the RFC to perform his past
13 relevant work as a sheet metal production worker, truck driver or retail sales clerk, bank
14 teller, the ALJ, relying on the opinion of the vocational expert, concluded that Waldon
15 could not perform any of his past relevant work. AR 912.

16 At Step 5, the ALJ considered Waldon’s RFC, age, education, work experience
17 and RFC, all in conjunction with the medical-vocational guidelines, and found that he
18 could successfully adjust to other work that exists in significant numbers in the national
19 economy. AR 913. Some of the representative jobs include table worker and final
20 assembler of optical goods. AR 913.

21 **II. DISCUSSION**

22 Waldon asserts the same challenges here as he did in his first appeal. He argues
23 that the ALJ erred by failing to (1) give clear and convincing reasons for rejecting the
24 opinions of Dr. Sprague, Waldon’s treating physician for 10 years; and (2) give clear and
25 convincing reasons for rejecting Waldon’s testimony. These are the same two points that
26 this court ordered the ALJ to address on remand.

27 ///

28 ///

A. Is There Substantial Evidence to Support the ALJ's Decision to Reject Dr. Sprague's Opinion?

The Social Security Act provides for judicial review of a final agency decision denying a claim for disability benefits. 42 U.S.C. § 405(g). A reviewing court must affirm the denial of benefits if the agency's decision is supported by substantial evidence and applies the correct legal standards. *Batson v. Comm'r of the Social Security Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001) (citation omitted). Put another way, it is "more than a scintilla but less than a preponderance." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). If the evidence is susceptible to more than one reasonable interpretation, the agency's decision must be upheld. *Id.*; *Batson*, 359 F.3d at 1193. Further, when medical reports are inconclusive, questions of credibility and resolution of conflicts in the testimony are the exclusive functions of the agency. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The reviewing court cannot reinterpret or re-evaluate the evidence however much a re-evaluation may reasonably result in a favorable outcome for the plaintiff. *Batson*, 259 F.3d at 1193.

In the first appeal, the ALJ rejected Dr. Sprague's opinion that Waldon was "'disabled', 'unable to work' [and] can or cannot perform a past job because they 'are not medical opinions but are administrative findings dispositive of a case, requiring familiarity with the Regulations and legal standards set forth therein and in the Dictionary of Occupational Titles.'" R&R 1, p.10 (quoting AR 27). The only other reasons offered for rejecting Dr. Sprague's opinion was reliance on the opinions of reviewing Drs. Steinberg, Hoskins, Klein and Tyutyulkova, who were "non-treating and non-examining physicians who did not have any relationship with Waldon and simply reviewed his medical records." R&R 1, p.13. On remand, this court ordered the ALJ to "provide due consideration to Dr. Sprague's findings and opinions with regard to these impairments:

1 diabetes, high blood pressure (hypertension), substance abuse,¹ significant numbness in
 2 thighs with severe pain (meralgia paresthetica), obstructive sleep apnea, obesity,
 3 depression and PTSD.” R&R 1, pp.13-14.

4 **1. Legal Standard for Rejecting Treating Physician Testimony.**

5 Where a treating doctor's opinion is not contradicted by another doctor, the
 6 commissioner can only reject the treating doctor's opinion for “clear and convincing”
 7 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where the treating doctor is
 8 contradicted by another doctor, the commissioner must provide “specific and legitimate”
 9 reasons based on “substantial evidence” to properly reject a treating physician's opinion.
 10 *Id.* at 830-831. The opinion of an examining physician alone can constitute “substantial
 11 evidence” because it rests on an independent examination. *Tonapetyan v. Halter*, 242
 12 F.3d 1144, 1149 (9th Cir. 2001). Moreover, “When confronted with conflicting medical
 13 opinions, an ALJ need not accept a treating physician's opinion that is conclusory and
 14 brief and unsupported by clinical findings.” *Id.* Finally, the “ALJ is the final arbiter with
 15 respect to resolving ambiguities in the medical evidence.” *Tommasetti v. Astrue*, 533
 16 F.3d 1035, 1041 (9th Cir. 2008.)

17 Here, Waldon received his medical treatment through the VA. Dr. Sprague was
 18 his primary care physician at the VA for 10 years and referred him out to specialists.
 19 There are no other treating doctors or consultative examinations cited to in the record. As
 20 explained in R&R 1, this court found that the ALJ’s reasons to reject Dr. Sprague’s
 21 opinion based on the opinions of the Commissioner’s examining doctors did not
 22 constitute substantial evidence to support the ALJ’s initial decision. Now, because Dr.
 23 Sprague’s opinion is not contradicted by another doctor, the Commissioner can reject her
 24 opinion only for clear and convincing reasons.

25
 26
 27 ¹ The court notes that the ALJ already determined that Waldon suffers from diabetes,
 28 high blood pressure and substance abuse, and asked the ALJ to reconsider the impact of
 those diseases in combination with the other diagnoses on remand.

1 **2. Did the ALJ Rely on Clear and Convincing Reasons to Reject Dr.**
2 **Sprague's Opinion?**

3 On April 8, 2010, Dr. Sprague described Waldon's functional impairments as
4 follows:

5 Over the time that I treated Mr. Waldon he had significant
6 functional impairment. This worsened over the time that I
7 treated him. He was disabled when I first evaluated him in
8 2000, and became increasingly disabled over time. His
9 symptoms include significant depression and anhedonia, severe
10 neuropathy and pain which limit his endurance and ability to do
11 many activities. Mr. Waldon has marked limitation in his
12 concentration due to pain and fatigue and marked impairment in
13 his social functioning. He would not be able to work in even a
14 sedentary job and it is very likely his medical and mental
15 functioning would likely worsen if he was in a competitive
16 work environment. Although he is able to perform his activities
of daily living, he would be unable to work in any capacity due
to his medical and medication side effects. In my opinion he
was unable to work since at least 6/30/02 and likely before that.
His condition is not reversible and is likely to be progressive
and I consider him fully and permanently disabled.

17 AR 852.

18 The ALJ considered Dr. Sprague's report and rejected it because he found that (1)
19 Waldon was non-compliant with his diabetes treatment; (2) Dr. Sprague's pain reports
20 were inconsistent with Waldon's physical activity; (3) Dr. Sprague's report of depression
21 and PTSD were based on false information from Waldon; and (4) Dr. Sprague's
22 determination that Waldon was disabled is an issue reserved to the Commissioner. The
23 court now evaluates whether those are clear and convincing reasons to reject Dr.
24 Sprague's opinion as to Waldon's functional impairments.

25 ***a. Waldon's Compliance with Diabetes Medications.***

26 The ALJ pointed out that Dr. Sprague reported that Waldon had "very poorly
27 controlled diabetes that required insulin." AR 909. The ALJ then pointed out that
28 treatment notes from Dr. Garniewski, a clinical pharmacist that Dr. Sprague referred

1 Waldon to, said that Waldon “had been only taking 5mg Glyburide once a day, although
2 it was prescribed to be taken twice a day. Therefore, [Waldon’s] diabetes was likely
3 uncontrolled because of his non-compliance with treatment.” AR 909. In support of this
4 statement, the ALJ cites to Exhibit 14F, which is 472 pages long.

5 Looking directly at Dr. Garniewski’s notes, it is inconclusive, at best, whether
6 Waldon complied with his prescription regimen. It actually appears that Waldon did
7 comply with the regimen, and that the more plausible explanation for the “non-
8 compliance” statement is a possible mistake in transcription as to the Glyburide dosage
9 prescribed for Waldon:

- 10 • January 27, 1998: Waldon prescribed to take 2.5 mg Glyburide orally once
11 a day. AR 875.
- 12 • December 22, 2000: Dr. Sprague, in a consult request, noted that Waldon
13 was taking 5 mg of Glyburide *daily* and “referred [him] to clinical pharmacy
14 *for adjustment of diabetes medication.*” AR 511, 512 (emphasis added).
- 15 • January 4, 2001: In making a further note regarding the consult request, a
16 Christina Walters, who followed up on Dr. Sprague’s referral, wrote that
17 Waldon was currently taking 5 mg of Glyburide *twice* a day instead of the
18 *once* a day noted by Dr. Sprague. AR 514.
- 19 • January 17, 2001: Pharmacist Dr. Garniewski, who took the referral and
20 reviewed Ms. Walter’s note, said that Waldon was taking 5 mg once a day
21 “instead of twice a day as prescribed by [Dr. Sprague]”. Dr. Garniewski
22 advised Waldon to start taking 5 mg of Glyburide twice a day, which he said
23 he would start doing that day. AR 515.
- 24 • January 29, 2001: Dr. Garniewski noted Waldon was currently taking 5 mg
25 Glyburide twice a day. AR 821.
- 26 • March 8, 2001: Dr. Garniewski noted Waldon was currently taking 5 mg
27 Glyburide twice a day. AR 811.
- 28 • April 16, 2001: Dr. Garniewski noted that Waldon was “on glyburide for 9
years and is most likely not achieving any benefit at this time. Will
[discontinue] glyburide.” AR 806.

1 At no place in Dr. Sprague's notes did she state that Waldon was to take 5 mg of
2 Glyburide twice a day. Rather, a possible explanation for Dr. Garniewski's notation that
3 Waldon had been prescribed 5 mg of Glyburide twice a day was that Christina Walters,
4 who worked in the pharmacy department and followed up on the referral, mistakenly
5 transcribed twice a day ("bid") instead of once a day ("qd"). Further, even if Dr. Sprague
6 had prescribed Waldon to take 5 mg of Glyburide twice a day, the prescription would
7 have come on or after December 22, 2000, which is less than a month before Waldon saw
8 Dr. Garniewski, who adjusted the diabetes medication. It does not seem likely, though,
9 that Dr. Sprague would have changed Waldon's diabetes medication herself to twice a
10 day because she referred Waldon to pharmacy expressly "for adjustment of diabetes
11 medication." AR 512. Finally, Dr. Garniewski noted that Waldon was "resistant to
12 discussing initiation of insulin." AR 515. If Waldon was trying to avoid taking insulin,
13 he would have been motivated to comply with taking his oral diabetes medications.

14 Defendant also argues that on January 31, 1998, Dr. Kambhampati noted that
15 Waldon was not compliant in taking his medications. AR 870. First, that statement
16 misstates the record, as Dr. Kambhampati was only referring to "INH," a medication used
17 to treat tuberculosis. Second, in 1998 Waldon had only been prescribed to take 2.5 mg of
18 Glyburide once a day, and as of 2001, Waldon had been more than compliant with that
19 regimen. Defendant's reliance on that statement by Dr. Kambhampati—which is taken
20 out of context—does not support its argument that Waldon was non-compliant with his
21 diabetes medication regimen.

22 In sum, the record shows that the fact that Waldon's diabetes was not controlled is
23 more likely due to the lack of effectiveness of the medications as opposed to Waldon's
24 alleged failure to follow his prescription regimen. Based on the facts in the record, the
25 ALJ's statement that "[Waldon's] diabetes was likely uncontrolled because of his non-
26 compliance with treatment" is not a clear and convincing reason to reject Dr. Sprague's
27 opinion. *See Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998) (requiring ALJs to
28 view the record as a whole and not parcel out evidence).

1 ***b. Waldon's Reports of Pain.***

2 The ALJ noted that there were several inconsistencies in Dr. Sprague's opinion,
3 including Dr. Sprague's reports that Waldon suffered from pain "so severe that he took
4 methadone for pain control" and had a distant history of a stroke. AR 909. The ALJ
5 pointed out:

6 [P]rogress notes dated January 17, 2001, report that [Waldon]
7 was walking 1-1/2 to 2 hours every day; and on February 7,
8 2001, he indicated that he was taking walks twice a day. This is
9 not consistent with someone experiencing severe pain in his
10 feet and does not take into account that this claimant has a
substance dependence history that includes dependence on pain
medications...

11
12 AR 909.

13 Waldon argues that his attempts at exercise complied with his doctor's
14 recommendation that he walk to combat his diabetes and that his walks do not
15 demonstrate an inconsistency with Dr. Sprague's pain evaluation. Here is just a sampling
16 from the record that shows that Waldon's doctors repeatedly ordered him to exercise:

- 17 • January 29, 2001: Waldon has been "walking 20 minutes twice a day [and]
18 [h]as not missed any medication doses. AR 821 (note by Dr. Garniewski).
 - 19 • February 7, 2001: "A daily routine of regular physical activity, as
20 appropriate for this patient's physical condition, was encouraged. The
21 patient was given the opportunity to ask questions and was able to verbalize
22 an understanding of the importance of regular exercise. AR 819 (note by
Licensed Vocation Nurse Christopher Theonnes).
 - 23 • February 26, 2001: "The patient is walking 20 minutes to half an hour twice
24 a day. Noted he get [*sic*] symptomatic when he walked for an hour-and-a-
25 half at a time." AR 817 (note by Dr. Sprague).
 - 26 • May 30, 2001: "...has been walking as much as he always did." AR 800
27 (pharmacy note by Christina Walters).
- 28

- 1 • November 21, 2001: “Has not been walking as much. Walks about 20-30
2 minutes 3 days a week. Used to walk every day.” Dr. Garniewski also
3 “advised increase in walking during the holiday” season. AR 785-786 (note
4 by Dr. Garniewski).
- 5 • March 14, 2003: “Walking a little.” “Discussed the role of exercise in
6 diabetes regimen.” AR 727-728 (notes by Judy McEuen, Diabetes Nurse
7 Educator).

8 Waldon’s attempts to exercise do not demonstrate an inconsistency in Dr.
9 Sprague’s opinion. First, even though the ALJ complained that Waldon did not follow
10 his doctor’s orders regarding diabetes medications, he now faults Waldon for trying to
11 comply with his doctor’s orders to exercise. Second, just because Waldon walked does
12 not mean he was without pain. In fact, Dr. Sprague knew that Waldon walked for
13 exercise, and must have considered that in her April 8, 2010 opinion. Third, from 2001
14 to 2003, the length of exercise steadily and significantly decreased, and in fact the one
15 and a half hour walk made Waldon “symptomatic.”

16 It seems that in this case, the ALJ substituted his lay opinion that walking was
17 inconsistent with Waldon’s reported pain, which is not permitted. *See Tackett v. Apfel*,
18 180 F.3d 1094, 1102-03 (9th Cir. 1999) (finding that an ALJ may not substitute his or her
19 lay opinion for those of medical professionals). The ALJ’s noted “inconsistency” is
20 therefore not a clear and convincing reason to reject Dr. Sprague’s opinion.

21 ***c. Waldon’s PTSD.***

22 The ALJ rejected Dr. Sprague’s opinion for this reason:

23 The doctor also reported that [Waldon] struggled with
24 depression and PTSD symptoms since she had known him.
25 However, this appears to be based on [Waldon’s] false
26 allegation of being drafted into the service during the Vietnam
27 War and seeing combat; which the claimant subsequently
28 admitted, including during his testimony at the hearing, was not
true (Exhibit 14F, 16F and claimant testimony).

AR 909.

1 Waldon's medical records from the VA include several statements regarding
 2 Waldon's military experience. These statements are all recited by the medical providers
 3 in their notes; it is unclear in some of the statements whether the provider learned the
 4 information directly from Waldon or if any of the information comes directly from
 5 military records. The statements include:

- 6 • "Are you a Vietnam-era veteran? Yes." AR 659 (Jan. 23, 2004 Nursing
 7 Note by Deborah Vaughn).
- 8 • "Waldon is a ... Coast Guard veteran who served during the Vietnam War."
 9 ***
 10 He "is a Vietnam veteran having served 14 months in country as an aviation
 11 machinist mate. He was drafted shortly after graduation from high school at
 12 age 18."
 13 ***
 14 "It should be noted that [Waldon] is a decorated Vietnam veteran, having
 15 received a head wound from shrapnel; he received a Purple Heart among
 16 other medals." AR 688-690 (Oct. 8, 2003 Progress Note by Karen Inaba,
 17 Psychiatric Nurse Practitioner).
- 18 • "After receiving his high school diploma, he was drafted into the service by
 19 lottery (period of service = 8/6/73 to 8/8/77, honorable discharge). He
 20 reported he had earned good grades, was student body president, and had
 21 planned to go to college but was drafted before he could get into college. He
 22 decided to enter the Coast Guard after assurances he would not have to go to
 23 Vietnam if he joined this branch. This was not correct, and Mr. Waldon was
 24 sent to Vietnam for 14 months where he worked on a PB4 small river boat
 25 and witnessed combat." AR 815 (Feb. 28, 2001 Psychiatric Outpatient Note
 26 by Dr. Gonzales).
- 27 • "MILITARY HISTORY: He served in the U.S. Coast Guard from 1972 to
 28 1977. His highest rank was an E5. This is also the rank he was discharged
 at. The patient saw combat during the Vietnam War and received a
 meritorious unit commendation with star." AR 873 (Jan. 28, 1998
 Discharge Summary by Dr. Yoshimoto).

27 Meanwhile, at the remand hearing, Waldon testified the following in response to
 28 questions from the ALJ:

1 Q: When did you go in the military?

2 A: In 19 – August of 1973.

3 Q: And when did you get out?

4 A: On August 01 1977.

5 Q: And what did you do in the military?

6 A: I was an aviation machinist mate [phonetic].

7 Q: And where did you serve?

8 A: I served in Sewick Bay [phonetic], the Philippines, also
9 Panama. And then in San Diego Air Station, San Diego.
10 Costguard [sic] Air Station, San Diego.

11 Q: Now, tell me what was the last job you did?

12 A: The last job was with George G. Sharp...

13 AR 960.

14 Later, Waldon testified in response to further questions by the ALJ:

15 Q. What did the PTSD – what was the root of the PTSD?

16 A. Well...we would do the drug interdiction stuff with customs
17 and...I fell over the side, and I just – I really thought I was
18 dead[.]

19 ***

20 A. I worked in conjunction ... with US Customs while I was
21 stationed here in San Diego [with the Coast Guard]. [W]e
22 did drug interdiction...we went out and chased down drug
23 people.

24 Q. At the boarder [sic]?

25 ***

26 A. No, on the water.

27 ***

28 Q. And is this, in your mind, was this the cause or the
beginning of your PTSD, the memories of this?

A. Yeah, yeah. Yes it was.

AR 983-984.

The record also includes several references to Waldon's PTSD and service during
the Vietnam War, including:

///

///

- 1 • “[Waldon] receives a VA pension. ...Mr. Waldon reported experiencing
2 depressed mood since his return from the Vietnam War in 1977. He
3 reported that ... after the war he had ‘lost his zest for living.’ ... Among his
4 past traumas are being shot, being stabbed, and two serious automobile
5 accidents. ...During the war he experienced enemy fire and witnessed the
6 death of friends. Mr. Waldon described symptoms consistent with PTSD:
7 re-experiencing (nightmares, intrusive memories, flashbacks when
8 triggered), hypervigilance/hyperarousal (exaggerated startle response,
9 checking his environment, quick to lose temper), and avoidance (memories
10 or movies about war, funerals). AR 813 (Feb. 28, 2001 Psychology
11 Outpatient Note by Dr. Linda Gonzales).
- 12 • “Impression: PTSD exacerbation.” AR 691 (Oct. 8, 2003 treatment note by
13 Karen Inaba, Psychiatric Nurse Practitioner).
- 14 • “Provisional Diagnosis: ptsd Vietnam.” AR 486 (Dec. 5, 2003 Mental
15 Health Consult Request).

16 The ALJ says that these statements about PTSD made throughout the record are
17 really just “false allegation[s] of being drafted into the service during the Vietnam War
18 and seeing combat” because when the ALJ asked Waldon where he served in the
19 military, Waldon did not expressly mention Vietnam. AR 909, 960 (“I served in Sewick
20 Bay² [phonetic], the Philippines, also Panama. And then in San Diego Air Station, San
21 Diego. Costguard [*sic*] Air Station, San Diego”).

22 The court is not convinced that Waldon’s failure to expressly mention Vietnam—
23 without any follow-up question by the ALJ—amounts to a “false allegation of being
24 drafted into the service during the Vietnam War and seeing combat.” Such a statement
25 would mean that Waldon’s omission of the word “Vietnam” is tantamount to an express
26 admission that he lied to all service providers over decades about his military experience,
27

28 ² The mention of “Sewick Bay” could reference “Subic Bay” in the Philippines, which
served as a U.S. Naval Base until 1992. “The Vietnam War was the period of peak
activity” for Subic Bay. *See*
https://en.wikipedia.org/wiki/U.S._Naval_Base_Subic_Bay#The_Vietnam_War (last
visited May 5, 2016).

1 which would call into question all the “depression and PTSD symptoms” that Dr.
 2 Sprague and others noted over the 10 years that he was her patient at the VA. *See* AR
 3 909. Without any follow-up questioning or documentary evidence that Waldon did not
 4 serve during the Vietnam War, the court finds that the record does not support the ALJ’s
 5 conclusion.

6 Further, the ALJ goes on to say that “during his testimony at the hearing, [Waldon]
 7 reported that he was not in Vietnam[.]” AR 911. This court has not identified any such
 8 testimony, and defense counsel has not pointed it out. It seems that the ALJ interprets
 9 Waldon’s statement that he got PTSD when he fell in the water during a Coast Guard
 10 interdiction of drug smugglers as tantamount to Waldon stating that he lied about service
 11 during the Vietnam War. *See* AR 911. Again, the court does not see any factual support
 12 for the ALJ’s conclusion here.

13 *d. Dr. Sprague’s Disability Determination.*

14 The ALJ again rejects Dr. Sprague’s opinion that Waldon is disabled because it is
 15 not a medical finding but an issue reserved to the Commissioner. AR 910. The court
 16 already rejected this rationale in R&R 1:

17 The ALJ rejected the “statements that a claimant is ‘disabled’,
 18 ‘unable to work’ [and] can or cannot perform a past job”
 19 because they “are not medical opinions but are administrative
 20 findings dispositive of a case, requiring familiarity with the
 21 Regulations and legal standards set forth therein and in the
 22 Dictionary of Occupational Titles.” AR 27. First, this court
 23 finds that Dr. Sprague was not trying to make an administrative
 24 decision but rather was offering her opinion. She couched her
 25 statements with, “In my opinion, he was unable to work . . .”
 26 and “I consider him fully and permanently disabled,” and
 27 therefore, she was not trying to substitute in her opinion for a
 28 definitive administrative decision. AR 852.

26 Second, the ALJ’s rejection of her “administrative opinion” is
 27 not supported by specific and legitimate reasons, and cannot
 28 serve to reject all of Dr. Sprague’s clinical findings and
 evidence as to the nature and severity of Waldon’s impairments.

See *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (finding the ALJ could not reject the physicians' uncontroverted opinion on the ultimate issue of disability without citing to clear and convincing reasons). The court notes that the ALJ's rejection of Dr. Sprague's conclusion simply highlights that the determination of whether Waldon is "disabled" is left to the Commissioner. See 20 C.F.R. 404.1527(d)(2).

R&R 1, p.10.

For the same reasons stated above, the court again rejects the ALJ's statement that Dr. Sprague should not have opined on the ultimate question of Waldon's disability because it is not a clear and convincing reason to reject Dr. Sprague's opinion.

B. Is There Substantial Evidence to Support the ALJ's Decision to Reject Waldon's Testimony?

1. Legal Standard for Rejecting Claimant's Testimony.

An ALJ must determine the extent to which a claimant's symptoms "can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how [those] symptoms affect [the claimant's] ability to work." 20 C.F.R. § 404.1529(a). But those statements alone cannot be decisive on a disability claim. 42 U.S.C. § 423(d)(5)(A) ("[a]n individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability"); 20 C.F.R. § 404.1529(a) ("statements about your pain or other symptoms will not alone establish that you are disabled").

A claimant's subjective symptoms must be considered in a disability evaluation. 20 C.F.R. § 404.1529; *Smolen v. Chater*, 80 F.3d 1273, 1291 (9th Cir. 1996). In deciding whether to credit a claimant's testimony about subjective symptoms or limitations, the ALJ must engage in a two-step analysis. *Batson*, 359 F.3d at 1195; *Smolen*, 80 F.3d at 1281. Under the first step, the claimant must produce objective medical evidence of an underlying impairment that could reasonably be expected to produce pain or other symptoms. *Batson*, 359 F.3d at 1195; *Smolen*, 80 F.3d at 1281. If this test is satisfied,

1 and there is no affirmative evidence that the claimant is malingering, then the ALJ must
 2 determine the credibility of the claimant's subjective complaints.

3 In assessing the credibility of the claimant's subjective complaints, the ALJ may
 4 consider such factors as the claimant's reputation for truthfulness, any inconsistencies in
 5 the claimant's statements, and the claimant's daily activities. *Tonapetyan*, 242 F.3d at
 6 1148; *Smolen*, 80 F.3d at 1284; *see* Social Security Ruling 96-7p (credibility findings
 7 "must be sufficiently specific to make clear to the individual and to any subsequent
 8 reviewers the weight the adjudicator gave to the individual's statements"); *Bunnell v.*
 9 *Sullivan*, 947 F.2d 341, 345-346 (9th Cir. 1991) (en banc) (ALJ cannot "arbitrarily
 10 discredit a claimant's testimony regarding pain" (internal quotations omitted)). The ALJ
 11 may reject the claimant's testimony about the severity of symptoms as long as he gives
 12 specific, convincing reasons for doing so. *Batson*, 359 F.3d at 1195; *Lingenfelter v.*
 13 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). "General findings are insufficient; rather,
 14 the ALJ must identify what testimony is not credible and what evidence undermines the
 15 claimant's complaints." *Lester*, 81 F.3d at 834. If the ALJ's interpretation of a
 16 claimant's testimony is reasonable and supported by substantial evidence, courts may not
 17 "second-guess it." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

18 **2. Did the ALJ Cite Clear and Convincing Reasons to Find** 19 **Waldon's Testimony Not Credible For a Second Time?**

20 Because there is objective medical evidence about the underlying impairments, the
 21 ALJ had to evaluate Waldon's subjective symptoms or limitations. The ALJ cites these
 22 nine reasons for finding that Waldon is not credible in describing his pain and limitations.

23 ***a. Activities of Daily Living.***

24 Because Dr. Sprague stated that Waldon could perform his activities of daily
 25 living, the ALJ finds Waldon not credible. But the full context of what Dr. Sprague said
 26 reads:

27 ///

28 ///

1 [Waldon] would not be able to work in even a sedentary job
2 and it is very likely his medical and mental functioning would
3 likely worsen if he was in a competitive work environment.
4 Although he is able to perform his activities of daily living, he
5 would be unable to work in any capacity due to his medical and
6 medication side effects.

7 AR 852. Thus, even though Waldon can perform his activities of daily living, his treating
8 physician opined that he has several other limitations that affect his ability to function in
9 a work environment. The ALJ does not point to substantial evidence in the record to
10 negate this finding. Therefore, the court finds it is not a clear and convincing reason to
11 find Waldon not credible.

12 ***b. Discontinuance of Alcohol and Drug Treatment.***

13 The ALJ stated that Waldon discontinued his drug and alcohol rehabilitation in
14 October 1997, and found this an independent reason to show he was not credible. AR
15 910. In support, he said “there were no allowable reasons offered for discontinuing his
16 alcohol and drug treatment regime[.]” AR 910. But Waldon eventually continued with
17 the rehabilitation and was reported to be in remission from drug abuse prior to his date
18 last insured. AR 814. Therefore, the court does not find this to be a clear and convincing
19 reason to find Waldon not credible.

20 ***c. Waldon’s Statements on Vietnam.***

21 The ALJ rejected Waldon’s testimony because he found that he made inconsistent
22 statements about his military service. AR 910-911. As already explained, the court does
23 not find substantial evidence in the record to support this assertion. This is not a clear
24 and convincing reason to find Waldon not credible.

25 ***d. Cardiac Catherization.***

26 The ALJ finds that Waldon was not credible because he did not show up for a
27 cardiac catherization on June 25, 1999, so the doctor opined that Waldon did not have an
28 acute illness. AR 911. But without further evidence as to what Waldon actually reported
as his symptoms and if it was reasonable to schedule a cardiac catherization, this does not

1 constitute substantial evidence to support the ALJ's determination that this was a reason
2 to find Waldon not credible.

3 ***e. Progress Notes re: Alcohol Use.***

4 The ALJ finds Waldon not credible because while on a medical visit to the VA on
5 December 1, 2000, Waldon purportedly said, "alcohol products *were* not used." AR 911
6 (emphasis added). The ALJ then explains that this is inconsistent with what Waldon
7 testified to at the remand hearing when he explained he had a history with alcohol and
8 drug abuse. AR 911. But the actual progress note from December 1, 2000 says, "Patient
9 states that alcohol products *are* not used." AR 836 (emphasis added). That statement is
10 quite different from what the ALJ quotes and more likely means that Waldon was not
11 using alcohol *at that time*. The court finds that the ALJ's twisting of Waldon's words
12 and using that misquote to imply that Waldon lied to the medical provider by saying he
13 never abused alcohol is not a clear and convincing reason to find Waldon not credible.

14 ***f. Waldon's Exercise Habits.***

15 The ALJ found that Waldon's exercise report did not correspond to his reports of
16 debilitating pain. AR 911. As already explained, the court does not find substantial
17 evidence to support this assertion. Waldon was following doctors' orders by exercising,
18 and his rate of exercise steadily decreased from 2001 to 2003. This is not a clear and
19 convincing reason to find Waldon not credible.

20 ***g. Diabetes Medication Regimen.***

21 The ALJ found Waldon not credible because he did not follow his diabetes
22 medication regimen. AR 911. As already explained, the court does not find substantial
23 evidence in the record to support this assertion. Therefore, it is not a clear and
24 convincing reason to find Waldon not credible.

25 ***h. Waldon's Limitations.***

26 The ALJ says that no physician ever opined that Waldon's ailments met or equaled
27 a listing. AR 911. But Dr. Sprague described Waldon as having "marked limitation in
28 his concentration due to pain and fatigue and marked impairment in his social

functioning.” AR 852. A marked limitation satisfies the criteria of the “Listing of Impairments.” *See* 20 C.F.R. § 404(p), Appendix 1 (Listing of Impairments) § 12.00 Mental Disorders (“We assess functional limitations using the four criteria in paragraph B of the listings: Activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation.”). Based on the content of the opinion of Dr. Sprague, the court finds this is not a clear and convincing reason to reject Waldon’s testimony.

i. Impairments and Pain.

The ALJ found that the objective medical evidence does not support a finding of disability. AR 911. But the rejection of a claimant’s testimony based on a lack of objective evidence is legally insufficient because it requires the consideration of “excess pain,” and not simply the degree of pain established by the objective medical evidence. *Bunnell*, 947 F.2d at 345; 20 C.F.R. § 404.1529(c)(2) (“we will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements”). Accordingly, the court does not find this to be a clear and convincing reason to find Waldon not credible.

III. CONCLUSION

A determination whether to reverse and award benefits or reverse and remand for further administrative proceedings is within the Court’s discretion. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). A finding of disability is warranted when further proceedings before the Commissioner on a fully-developed issue would be futile. *Smolenr*, 80 F.3d at 1292. Having already been remanded for a second set of proceedings, and now finding again that the record does not support the ALJ’s second-identified set of “clear and convincing” reasons to reject the opinion of Dr. Sprague who treated Waldon for 10 years, the court finds that a second remand would be futile. In light of the above discussion, the court concludes that the ALJ erred in rejecting the opinion of treating physician Dr. Sprague and erred in not finding Waldon to be credible.

1 *See Lester*, 81 F.3d at 829-830 (finding a failure to properly consider the treating opinion
2 is reversible error).

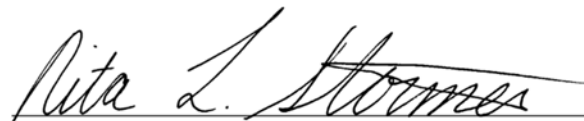
3 Accordingly, the court finds that Waldon is entitled to disability benefits as of the
4 date of his eligibility. Based on its review of the record and consideration of the briefs,
5 the court **RECOMMENDS** that Plaintiff's Motion for Summary Judgment be
6 **GRANTED** and Defendant's Cross-Motion for Summary Judgment be **DENIED**. This
7 court **RECOMMENDS** that final decision of the Commissioner be **REVERSED** and
8 **REMANDED** to the Social Security Administration for the calculation and award of
9 benefits.

10 This Report and Recommendation is submitted to the United States district judge
11 assigned to this case pursuant to 28 U.S.C. § 636(b)(1). Any party may file written
12 objections with the court and serve a copy on all parties on or before **May 24, 2016**. The
13 document should be captioned "Objections to Report and Recommendation."

14 Any response to the objections shall be filed and served on or before **June 1, 2016**.
15 The parties are advised that any failure to file objections within the specified time may
16 waive the right to raise those objections on appeal of the Court's order. *Baxter v.*
17 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991).

18 **IT IS SO ORDERED.**

19 Dated: May 10, 2016

20 

21 Hon. Nita L. Stormes
22 United States Magistrate Judge
23
24
25
26
27
28